Supreme Court, U.S.
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No. 96-135

In The

Supreme Court of the United States

October Term, 1995

JACK KEVORKIAN,

Petitioner,

v.

STATE OF MICHIGAN ex rel OAKLAND COUNTY PROSECUTING ATTORNEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Michigan

BRIEF OF RESPONDENT PROSECUTING ATTORNEY RICHARD THOMPSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THIS COURT SHOULD DECLINE TO GRANT CERTIORARI WHERE PETITIONER HAS FAILED TO RAISE IN THE LOWER STATE COURTS THE FEDERAL ISSUES UPON WHICH HE NOW SEEKS REVIEW?

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Petitioner Richard Thompson, Prosecuting Attorney in and for the County of Oakland, State of Michigan, by Richard H. Browne, Assistant Prosecuting Attorney, on behalf of the People of the State of Michigan, respectfully prays that this Honorable Court deny Petitioner's Petition for a writ of certiorari to review the opinion of the Michigan Court of Appeals entered on May 12, 1995 and reported as *People ex rel Oakland County Prosecuting Attorney* v *Kevorkian*, 210 Mich. App. 601; 534 N.W. 2d 172 (1995).

CITATIONS TO OPINIONS BELOW

The opinion of the Michigan Court of Appeals is found at *People ex rel Oakland County Prosecuting Attorney* v *Kevorkian*, 210 Mich. App. 601; 534 N.W. 2d 172 (1995). The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal is found at *People ex rel Oakland County Prosecuting Attorney* v *Kevorkian*, 451 Mich. 874; ___ N.W.2d ___ (1996).

JURISDICTION

The decision of the Michigan Court of Appeals was entered May 12, 1995, and the order of the Michigan Supreme Court denying leave to appeal was filed on April 26, 1996. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). However, he seeks a writ of certiorari to the Michigan *Supreme* Court.

As shown by the order of the Michigan Supreme Court (reproduced in Petitioner's Appendix at A-2), Petitioner's application for leave to appeal was denied by that court "because [the Court is] not persuaded that the question presented should be reviewed by this Court." Discretionary review having been denied by the Michigan Supreme Court, Petitioner improperly seeks a writ of certiorari to that court rather than to the Michigan Court of Appeals as he should. *Interstate Circuit, Inc.* v *Dallas*, 390 U.S. 676, 678 n 1, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968); *Brown* v *Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which Petitioner claims this petition involves are:

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [Emphasis supplied.]

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy

> of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use without just compensation. [Emphasis supplied.]

Constitution of the United States, Amendment IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Constitution of the United States, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner's Statement of the Case does not set forth when the issues now raised by Petitioner were presented in the lower courts. That omission arises from the fact that the issues were never presented below and thus were never ruled on by the lower courts. Petitioner has failed to present, as required by Rule 14.1(g)(i) the

> * * * specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions

> sought to be reviewed were raised; the method and manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. * * * .

The factual background of this case is adequately presented in the decision of the Michigan Court of Appeals, *Kevorkian, supra,* 210 Mich. App. at 603-606:

> On June 4, 1990, defendant helped Janet Adkins commit suicide. On June 6, 1990, the people filed a complaint for injunctive relief and a motion for temporary restraining order. The temporary restraining order was not granted, but the trial court did issue an order to show cause why a preliminary injunction should not be issued. At the conclusion of a hearing on June 8, 1990, at which defendant testified, the trial court issued a preliminary injunction temporarily enjoining defendant from using or providing his suicide machines or other devices or drugs in order to help a person seeking to end a human life.
>
> A trial was held regarding the people's request for injunctive relief in January 1991. Although defendant did not testify at trial, his testimony from the June 8, 1990, hearing was admitted as an exhibit. In addition, a statement

prepared by defendant was admitted as an exhibit. Numerous other witnesses also testified.

Defendant admitted that he helped Ms. Adkins commit suicide by means of his "suicide machine," which consists of a frame holding three chemical solutions fed into a common intravenous line controlled by a switch and a timer. Defendant admitted that he inserted the intravenous line needle into Ms. Adkins' arm, but testified that Ms. Adkins activated the switch that turned on the machine and that Ms. Adkins wished to die because she had Alzheimer's disease and feared for the future. He testified that he discussed the matter with Ms. Adkins and her husband. However, he also admitted that he had no clinical training in Alzheimer's disease and was unaware of the progress of the disease in Ms. Adkins or whether modes of treatment were available. He testified that he is certified in anatomic and clinical pathology, that he has been unemployed in medicine since 1982 and living off savings, in part because his actions and theories have been controversial, and that he has no special training in Alzheimer's disease, geriatric diseases, or neurology. He admitted that the use of his machine was not a medically accepted or recognized procedure. He also stated that he will use his machine in the future in the absence of an injunction preventing him from doing so.

On February 5, 1991, the trial court issued an opinion and order permanently enjoining defendant from using his machine or otherwise assisting in a suicide. The court found as fact that defendant's actions in this case occurred as part of a physician-patient relationship and that

his actions must therefore be judged under currently operative standards of medical practice, and not standards that might ensue in the future. The court found that defendant is by education and training a retired pathologist without any experience or any knowledge in the fields of internal medicine, geriatric medicine, psychiatry, neurology, or other areas that might be helpful in diagnosing and managing Alzheimer's disease. The court found that defendant was not professionally qualified to evaluate the physical or emotional status of Ms. Adkins. Moreover, the court found that defendant made no attempt to take a comprehensive medical history, conduct a physical examination, order any tests, assess Ms. Adkins' medical status, or consult with experts. The court found that Ms. Adkins, who was fifty-four years old, was neither imminently terminally ill nor suffering from pain. After reviewing the videotaped interview conducted by defendant with Ms. Adkins and her husband, the court found that she was coherent, responsive to verbal communication, and without any obvious physical or mental impairment. The court noted reports that she had played tennis within days of her death. Likewise, the videotape demonstrated that defendant made no real effort to discover whether Ms. Adkins wished to end her life, relying largely on the statements of her husband and a few limited responses from Ms. Adkins. The court found that defendant appeared to be in a hurry during the videotaped interview. The court found that Alzheimer's disease was not within the province of defendant's specialty and that his actions did not conform to accepted medical standards. In particular, the court noted

> in its opinion that defendant had threatened to use his machine again in the future in the absence of an injunction preventing him from doing so.
>
> On appeal, defendant does not challenge any of the trial court's findings of fact. Instead, defendant raises two questions of law.
>
> First, defendant claims that the trial court erred in denying his motion for summary disposition based upon the doctrines of collateral estoppel and res judicata after a district court ruled in a related criminal case against the defendant that assisting suicide is not a crime under the laws of the State of Michigan.
>
> * * *
>
> Defendant also claims that the trial court lacked jurisdiction to enjoin him from committing a legal act. As indicated above, it is now clear that defendant's claimed legal act was in fact illegal. [*People v*] *Kevorkian, supra* [447 Mich 436 (1994)]. Alternatively, defendant argues that even if his actions were criminal, injunctive relief should not be available in this case. We disagree.

As noted by the Michigan Court of Appeals, Petitioner raised the following issues in his appeal to the Michigan Court of Appeals:

> [I.] THE LOWER COURT ERRED BY DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION BASED ON THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA.

[II.] NATURE OF THE ACTIVITY: CRIMINAL, IMMORAL OR BREACH OF STANDARD OF CARE?

A. Aiding and Abetting suicide is not a crime under the laws of the State of Michigan and assisting suicide is a legal act which cannot be enjoined by a court of equity.

B. The issue of self-determination discloses a moral, ethical and religious debate to be responded to by the legislative will of the People, not the judiciary.

C. An act that is outside the definition of the practice of medicine does not violate the licensing statutes of the State of Michigan.

[III.] THE ISSUANCE OF AN INJUNCTION BARRING DR. KEVORKIAN FROM ASSISTING SUICIDE WAS OUTSIDE THE SCOPE OF THE COURT'S JURISDICTION AND CONSTITUTED AN ABUSE OF DISCRETION.

A. The exercise of police power is reserved to the legislative branch of government.

B. Injunctive relief is not a proper remedy when other remedies at law are available.

As noted above, the Court of Appeals rejected Petitioner's arguments and affirmed the judgment of the lower court. *People ex rel Oakland County Prosecuting*

Attorney v *Kevorkian*, 210 Mich. App. 601; 534 N.W.2d 172 (1995).

Following the decision of the Court of Appeals in this case, Petitioner sought delayed leave to appeal in the Michigan Supreme Court. Petitioner raised the following issues:

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE CIRCUIT COURT'S DENIAL OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION BASED ON THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA AFTER DISTRICT COURT JUDGE MCNALLY HAD RULED THAT ASSISTING SUICIDE WAS NOT A CRIME UNDER THE LAWS OF THE STATE OF MICHIGAN.

II. THE COURT OF APPEALS ERRED IN UPHOLDING THE UNPRECEDENTED INJUNCTION AGAINST DEFENDANT EVEN IF ASSISTING SUICIDE LATER BECAME A "CRIME" PURSUANT TO 1993 PA 3; MCL 752.1027.

III. THE COURT OF APPEALS ERRED IN UPHOLDING THE INJUNCTION AGAINST DEFENDANT WHEN IT CLEARLY VIOLATED DEFENDANT'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

On April 26, 1996, the Michigan Supreme Court denied Petitioner's application for leave to appeal, "because we are not persuaded that the question [sic] presented should be reviewed by this Court." *People ex rel*

Oakland County Prosecuting Attorney v *Kevorkian*, 451 Mich. 874; ___ N.W.2d ___ (1996).

Petitioner has now filed a petition for writ of certiorari to the Michigan *Supreme* Court in which he attempts to raise federal constitutional issues which he failed to previously present to the lower state courts.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DECLINE TO GRANT CERTIORARI WHERE PETITIONER HAS FAILED TO RAISE IN THE LOWER STATE COURTS THE FEDERAL ISSUES UPON WHICH HE NOW SEEKS REVIEW.

Petitioner seeks to have this Honorable Court grant his petition for certiorari to review questions allegedly arising under the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. However, as demonstrated by Respondent's recitation in the Statement of the Case above, Petitioner never raised *any* issues in the lower courts regarding the Fifth, Ninth, or Fourteenth Amendments. The only issue he raised concerning the First Amendment dealt with the right to free speech rather than a right of privacy or personal autonomy which gives rise to a constitutional right to commit suicide *with assistance*, and this issue was *not* raised in his appeal to the Michigan Court of Appeals.[1]

[1] Petitioner claims in his Petition (p 4) that he sought review in the Michigan Court of Appeals arguing that the

It is axiomatic that this Court will not consider for the first time on petition for writ of certiorari issues which have not been presented to, and ruled upon by, the lower courts. *Bankers Life & Casualty Co.* v *Crenshaw*, 486 U.S. 71, 76-77, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988). Since Petitioner never presented his Fifth, Ninth, or Fourteenth Amendment claims to the lower state court, and since the ruling of the Michigan Court of Appeals (upon which he seeks this Honorable Court's grant of discretionary review) never addressed these unpresented and unpreserved claims, this Honorable Court should decline to address them.

Even the First Amendment claim Petitioner belatedly sought to raise in the Michigan Supreme Court is not deserving of review by this Honorable Court. First, it was not raised in his appeal to the Michigan Court of Appeals and was not considered or ruled on by that court. Second, although presented to the Michigan Supreme Court, since that court summarily denied review, the issue was never considered or ruled upon by that court either. Finally, there is no merit to Petitioner's claim, and thus no reason to grant review.

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injunction violated his right to freedom of speech. He cites in support a page from his application to the Michigan *Supreme* Court. (App. A-31) Thus his claim that "The Court of Appeals utterly failed to address the Freedom of Speech issue." (Pet. p 5) is only accurate if one recognizes that Petitioner "utterly failed" to raise the issue in the Court of Appeals and therefore that Court could not address it.

The injunctive order clearly states:

> IT IS HEREBY ORDERED that for the reasons set forth in this Court's Opinion of February 5, 1991, Defendant Dr. Jack Kevorkian, his agents, and employees, and those in active concert or participation with him, shall be and hereby are permanently enjoined from: using, employing, administering, offering, or providing any of his "suicide machines", or other similar devices, contrivances, or other modalities or drugs (including nonprescription drugs) on, or to, any persons seeking to end a human life, or conducting any acts to help a patient commit suicide regardless of the modality employed.

[Petitioner's Appendix, A-2]

This Honorable Court will search in vain for any prohibition on Petitioner's right of free speech in the above injunction. Petitioner is not forbidden from speaking about, writing about, or advocating on the topic of "assisted suicide." Nor is he forbidden from counseling persons seeking to end their lives. Petitioner is solely forbidden from "*using, employing, administering, offering, or providing* any of his suicide machines . . . on, or to, any persons seeking to end a human life". This ban is directed at acts, not speech. Petitioner provided poison and a poison dispensing "death machine" to a woman in the early stages of Alzheimer's disease and assisted this woman to utilize the machine in order to kill herself. She was not terminally ill; she was not suffering any physical or mental pain. It was these *acts* which the Oakland County Circuit Court enjoined – not Petitioner's advocacy of assisted suicide, or his writing or speech-making

on this topic.[2] The *acts* of direct assistance were, and are, criminal under the law of the State of Michigan. *People* v *Kevorkian*, 447 Mich. 436, 445; 527 N.W.2d 714 (1994), cert den ___ U.S. ___, 115 S. Ct. 1795, 131 L. Ed. 2d 723 (1995).

Therefore, none of Petitioner's claims was presented to, or decided by, the state courts. This Honorable Court should therefore adhere to its settled practice and decline to review claims which were not presented or decided below. *Wilson* v *Cook*, 327 U.S. 474, 480-484, 66 S. Ct. 663, 90 L. Ed. 62 (1946).

This Honorable Court should also note that it declined to grant certiorari in the criminal case wherein Petitioner's due process and equal protection claims were properly presented. *People* v *Kevorkian, supra*. It makes little sense to refuse to review federal claims in a case where they were properly raised and decided, and then to grant certiorari to review such claims in a case where they were never presented to, or decided by, the lower state courts.

Furthermore, this Honorable Court may note that Petitioner's due process and equal protection claims have

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[2] Petitioner offers the example of a young man who published a description of how a homemade nuclear bomb could be constructed and asserts that his own publications and advocacy work are similarly protected by the First Amendment. (Pet., at 21 n 7.) What Petitioner fails to grasp, however, is that an injunction could be issued against the young man in his illustration if he had attempted to build or use his nuclear device. Likewise, the injunction issued in the instant case could properly forbid construction, provision, or use of Petitioner's death machines without interfering with his First Amendment rights.

been properly preserved and presented in the pending petitions for certiorari in *Vacco* v *Quill*, 80 F.3d 716 (CA 2, 1996) (cert pending, U.S.S.C. no. 95-1858) and *Washington* v *Glucksberg*, 79 F.3d 709 (CA 9, 1996) (cert pending, U.S.S.C. no. 96-1110). Thus these claims will not evade review should this Court determine that the time is ripe to decide them.

Finally, Petitioner asserts that his petition for certiorari should be granted because "The Question Herein is Important." (Pet., at p 24) The issue in this case is one of state law: does a state trial court have the authority to issue an injunction against the commission of illegal acts by an unlicensed doctor which are outside the spectrum of recognized and accepted medical practice and which inevitably result in the death of the patient? With all due respect to this Honorable Court, this question is a matter of state law which does not raise justiciable federal constitutional issues.

The larger question which Petitioner wants this Court to address is a matter for the legislature, and should, under our scheme of representative democracy, be left to the legislative branch for resolution, subject, of course, to constitutional review by the judicial branch.

For the above reasons, Respondent respectfully submits that the issues presented by Petitioner are not properly preserved for review in this Court, that they are without merit, and that the constitutionality of the practice of so-called "assisted suicide" is properly before this Court in two federal cases, and may be resolved in those cases. This Court should therefore decline to grant certiorari in the instant case.

CONCLUSION

WHEREFORE, Petitioner Richard Thompson, Prosecuting Attorney in and for the County of Oakland, by Richard H. Browne, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to deny Petitioner Kevorkian's petition for writ of certiorari to review the decision of the Michigan Court of Appeals.

Respectfully submitted,

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